SUPREME COURT, U. S.

No. 1138

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

THE BOSSERT MACHINE COMPANY,
An Ohio Corporation and
JULIUS G. BOSSERT,
Petitioners,

vs.

THE CITY OF CINCINNATI,
A municipal corporation under the laws
of the State of Ohio,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM A. McCLAIN
City Solicitor

THOMAS H. CRUSH
Assistant City Solicitor
Attorneys for Respondent

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STATEMENT OF THE CASE

The statement of facts presented in the petition of the Bossert Machine Company is acceptable as far as it goes. However, one additional fact should be brought to the attention of the court.

Perhaps the most significant fact in the case is the timing of the pleadings. The petition was filed on May 19, 1967. Under the law of Ohio, the answer should have been filed on or before June 17, 1967, approximately *one month*

later. The answer was, in fact, filed on September 13, 1967, *three months* after the filing of the petition.

No excuse of any kind at any time was ever offered for this inordinate delay in filing an answer.

REASONS FOR DENYING THE WRIT

The basic question presented in this matter is whether property is being taken without due process of law. The question of due process involves Article III, Section 2, the Fifth and Fourteenth Amendments of the Constitution of the United States. The matter also involves Article XIII, Section 5, and Article I, Section 19, of the Constitution of Ohio. These articles of the Ohio Constitution (see Appendix) provide that private property shall not be taken for public use unless compensation therefor shall be paid for in money, and that compensation shall be determined by a jury of twelve men.

The eminent domain statutes of Ohio have long held that an answer denying the valuation set by the government must be filed within a stated period of time. If no answer is filed within the stated period of time, then it is conclusively presumed that the owner accepts the value set by the government. The only thing that need be done by the property owner is the filing of an answer. It is not necessary that he allege a counter-valuation in his answer or deny anything other than the valuation. The date on or before which the answer must be filed is clearly set out on the writ attached to the petition served each defendant in each case.

The Supreme Court of Ohio, on several occasions, has indicated that the requirement of answering an appropriation petition and denying the value contained therein is in the nature of an appeal. In other words, the filing of

the answer on time is jurisdictional, just as the filing of a notice of appeal is jurisdictional.

Many other states have similar laws, and have similarly construed them to the extent of denying the property owner a jury trial on the matter of valuation unless the landowner demands a trial.

A second more specific question is whether a person can waive a jury trial guaranteed to him by the Ohio Constitution, either by agreement or by mere inaction.

This question, too, has been answered several times by the Supreme Court of Ohio and of other states. There seems little doubt that a person may waive a jury trial if he does not wish it. The fact that this may be done in criminal cases is so evident as not to require discussion. Rules of court often require that juries be demanded in criminal trials within a certain period of time before trial.

It would seem that the appellants simply and utterly failed to make any effort of any kind to preserve their rights. They had abundant time in which to file an answer denying the valuation set up by the City, and simply did not do so. They have not been denied due process but have denied it to themselves by not even requesting it. A jury trial could have been had by them upon demand. The valuation of the City could easily have been denied. There was ample time in which to demand a jury or to deny the valuation. Neither was done, at no fault of the appropriating agency.

REVIEW OF THE CASES AND LAW

The Supreme Court of Ohio, in addition to the decision in the instant matter, had at least twice before, handed down decisions in closely analogous situations (*In Re Appropriation for Highway Purposes,* 177 O.S. 118,

29 O.O. 2d 316, 203 N.E. 2d 247 — 1964; *In Re Appropriation of Easement for Highway Purposes,* 172 O.S. 338, 16 O.O. 2d 116, 175 N.E. 2d 512 — 1961). Both of these cases involve procedure under Chapter 5519, Ohio Revised Code, which is a chapter involving appropriation by the State Highway Department and, in many respects, similar to Chapter 163 of the Ohio Revised Code under which the appropriation in this matter was effected.

Chapter 5519 sets forth the procedure for appropriation which, except for nomenclature, follows the pattern of Chapter 163; namely, that the director of highways must file a petition setting forth the valuation set upon the property by the government; within 30 days the owner must file a paper objecting to the valuation; if no such objection is filed, the property is taken by the highway department at the value asserted by the director of highways.

In both of these cases, the Supreme Court of Ohio found that the . .

> "filing of a petition setting forth the intention to appeal, as provided in the above quoted section, is comparable to the filing of a notice of appeal in the ordinary civil action and, consequently, is jurisdictional."

The Supreme Court of Ohio, in *Bethesda Hospital* v. *Preston,* (175 O.O. 277, 194 N.E. 2d 139 — 1963) considered the question whether Article I, Section 19, of the Ohio Constitution, relative to the determination of compensation by a jury, is mandatory. In this case there was a positive waiver of a jury trial, rather than a failure to demand a jury within a certain time. The court, however, in the opinion, stated that this section was not mandatory and further:

> "It appears that the great weight of authority supports the proposition that the parties in a highway

> land acquisition may, by stipulation or agreement, waive the constitutional provision that compensation shall be assessed by a jury."

This case indicates that the right to a jury trial may be delayed by positive action.

Other cases indicate that a jury trial may be waived by inaction. In *Cassidy* v. *Glossip* (12 O.S. 2d 17), the Supreme Court of Ohio considered rule 22 of the Common Pleas Court of Butler County, which provided that failure to demand a jury trial three days before trial shall be deemed a waiver of jury trial. The Supreme Court stated,

> "A rule of a common pleas court, providing that a party shall request a jury not later than the third day prior to the date of the commencement of the trial, or shall be deemed to have waived a jury trial, is a procedural rule that does not deny a party his right to a jury trial or otherwise conflict with Section 5 of Article I of the Constitution."

Although the *Cassidy* case did not involve an appropriation action and did not involve Article I, Section 19 of the Ohio Constitution, it nonetheless stands for the proposition that a right to jury trial guaranteed by the Constitution can be waived by inaction on the part of the parties involved.

In Corpus Juris Secundum, we find the statements:

> "A constitutional guarantee that the compensation shall be assessed by a jury may be waived, as where there is a failure to make due and timely application for jury trial on appeal from an award by commissioners or on appeal from a judgment confirming such award." (29 C.J.S., Eminent Domain, Section 281, page 1285.)

> "There must be a demand made for a jury, and the right to a jury is waived by failure to make such demand within the time fixed by statute." (30 C.J.S., Eminent Domain, Section 372, page 71.)

Under the Federal Rules of Civil Procedure, Rule 71A (h), 28 U.S.C.A., any party to a condemnation proceeding is entitled to a jury trial of the issue of compensation and may obtain such trial by filing a demand therefor within the time allowed for answer or within such further time as the court may fix (*Atlantic Seaboard Corp.* v. *Van Sterkenburg,* 318 F. 2d 455). But the denial of a tardy demand for a jury is not considered to be an abuse of discretion (ibid.) Thus, under the federal rules, although there is no specific time limit on the right to demand a jury, the right may be lost by excessive delay.

CASES OF APPELLANTS DISTINGUISHED

One case which the appellants have been citing from the first appeal in the State of Ohio has been the *Shario* case. (*Shario* v. *State,* 105 O.S. 535.) This case is simply not applicable to this matter. The *Shario* case has been quoted by appellants to stand for the proposition that the General Assembly may not limit the time within which an appeal may be taken. The *Shario* case assuredly does not stand for this proposition. In fact, it holds exactly the opposite proposition, and this was commented on by the Supreme Court of Ohio.

Appellants in quoting *Shario,* have confused action taken after jurisdiction is invoked with action to invoke jurisdiction. *Shario* states that the legislature may not prescribe the time within which a case must be heard after the jurisdiction of the court has been invoked. But *Shario* further states:

> ". . . prescribing the manner of invoking the jurisdiction, the pleadings, and the time within which jurisdiction shall be invoked . . . has always been regarded in the proper province of legislative action . . ."

In other words, the *Sharlo* case only stands for a proposition admitted by the appellees, namely, that the legislature may not interfere with the court's running its own docket. However, this rule of law has absolutely no application to the present matter. Chapter 163 states that the court does not even have jurisdiction to hear the matter unless an answer has been filed on time.

In Re Appropriation (120 O.A. 273, 201 N.E. 2d 889), stands for the same proposition that after jurisdiction is taken by the court, the legislature is powerless to dictate the running of the court's docket. It has no application to the present matter.

Three other cases cited by the appellant only stand for the general proposition that one is entitled to due process of law. (*Anderson National Bank* v. *Luckett,* 64 S. Ct. 599; 321 U.S. 233; *Shelley* v. *Kraemer,* 68 S. Ct. 836, 334 U.S. 1; *State* v. *Brown,* 182 S.E. 838, 294 S. Ct. 294; Appeal dismissed, 56 S. Ct. 750, 298 U.S. 639.)

Another case has been cited by appellants to support their proposition. Amazingly, it clearly stands for the opposite proposition; and was, in fact, quoted to support the opinion of the Supreme Court of Ohio in its decision. This is *Reckner* v. *Warner* (22 O.S. 275 — 1872). This case states that the constitutional guarantee of the jury trial nonetheless permits the legislative branch to set forth procedures by which the jury is obtained.

The appellants also claim that this court knows that there are justifiable reasons for granting leave to plead such as death, disability, minority, absence from the state. The question herein is not excuses for the failure to plead,

in the sense of filing responsive pleadings, but excuses for the right to file a notice of appeal within time. This court knows that the filing of the notice of appeal within time is jurisdictional and, except for the most extreme reasons, will not be waived. Whether the necessity of filing one's answer on time, under Ohio law, could ever be waived, even for the most serious reasons, is not ever relevant to this case, because the appellants did not file an answer for some two months after the time they should have answered, and have given absolutely no reason for failing to act. If an exception is available to them, they have utterly failed to show that they come within the exception.

The only statement remotely explanatory made by the appellants is that they had to hire appraisers to determine what the value of their property is. This is hardly an excuse, because as has been indicated before, all that had to be done upon being sued, was filing an answer denying the valuation. If the appraisal should have indicated that the value alleged by the City was correct, then an agreement could have been reached with the City without jury trial, or the answer withdrawn.

In a parallel situation one does not claim that a notice of appeal was not filed because the law had not been researched. Similarly, all that was ever required of the appellants in this matter was the simple technical procedure of filing an answer within 30 days. They had ample time to do so and failed to do so.

Appellants have indicated that we are concerned with a quick take procedure which is contrary to guarantees of due process under the Ohio and Federal Constitutions.

We are not concerned with a quick take procedure in any way. The quick take procedure, under Chapter 163, provides that property may be taken in certain instances

before a determination of the value of that property by a jury. There is no question that this is a difficult area of the law. As a matter of fact, the quick take procedure has almost never been tried in the state of Ohio and never in the city of Cincinnati. The quick take procedure, which is a separable part of Chapter 163, was not used in this case and is not applicable to this case. The property in this matter was not taken until ample time for the demand for a jury trial had been afforded appellants. Compensation was awarded before the take.

Lest this court feel that the State of Ohio is somehow more harsh than others in regard to jurisdictional appeal time in appropriation matters, the law of some other States having similar appeal provisions might be considered.

Indiana provides us with a legal situation almost on "all fours" with the one in Ohio. Section 3-1702 of the Indiana Statutes Annotated provides that condemnation proceedings may be brought in the Circuit or Superior Court of the county where such land is situated. Section 3-1704 provides for the appointment of appraisers to place a valuation on the property being taken. Section 3-1707 provides in part:

> "Any party to such action aggrieved by the assessment . . . may file written exceptions thereto in the Office of the Clerk of such Court . . . within ten (10) days after filing of such report . . ."

The case of *State* v. *Redmon,* 205 Indiana 335, considered the question of whether exceptions could be filed after the ten (10) day period provided in Section 3-1707, and came to the conclusion that they could not be so filed. At Page 338 the Court reasons:

> ". . . there is no express statutory authority" to allow a party to file his pleadings after the time limited therefor.

> "A trial court may, in its discretion, extend the time for filing pleadings when the fixing of the time is within the discretion of the Court, but a trial court cannot extend the time when the time is fixed by statute. This is especially true when the time limited constitutes an element of a right or privilege which is being asserted in a pleading in a special statutory proceeding . . . either party to a condemnation proceeding has the privilege of filing written exceptions to the assessment of damages within ten (10) days after the filing of the Appraisers' report. It is clear that neither party can file exceptions after the expiration of the ten (10) days if neither party has filed within the ten (10) days".

It is clear that, in a situation similar to ours, the State of Indiana forbids exceptions to be taken to the valuation after the statutory period for exceptions has passed.

Article II, Section 9 of the Constitution of *West Virginia* states in part:

> "Private property shall not be taken . . . without just compensation . . . when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders."

Article III, Section 13 reads in part:

> "In suits at common law, where the value in controversy exceeds twenty dollars . . . the right of trial by jury, if required by either party, shall be preserved . . ."

The Supreme Court of West Virginia considered the constitutional provisions above in *State* v. *Boggess,* 126 S. E. (2d) 26 (1962), where a landowner did not demand a jury trial in an appropriation matter within 10 days provided for by statute. The Court stated:

> "There was no right to a jury trial in an eminent domain proceeding at common law."

> "The landowner, therefore, has no right to a jury trial in this eminent domain proceeding except to the extent that such right is provided for by the Constitution and the statutes which confer such right."
>
> "The right to a jury trial in an eminent domain proceeding requires positive action on the part of the one desiring such jury trial."

In *Minnesota,* we come across a situation very similar to Ohio. Chapter 117.015, Part 3, provides for the filing of a petition in an eminent domain action in the District Court of the county in which the land is situated. Chapter 117.09 provides for the filing of a report by the Commissioners. Chapter 117.3 provides in part:

> "At any time within thirty (30) days after service of notice that the report has been filed, the owner of lands taken may appeal to the District Court from any award of damages embraced in the report . . ."

In the case *In Re Eystad,* 214 Minn. 490, the Court, in construing Section 117.20 (similar to 117.13 but applying eminent domain proceedings in State Highway matters) the Court held:

> "We hold without hesitancy, that the latter act (Section 117.20) governs, and affords the exclusive means whereby the landowner may review his award, and that appeals thereunder (proceedings by the State, its agencies or political subdivisions) must be taken within thirty (30) days from the date of the filing of the Commissioners' report."

Once again, it is evident that the landowner being given the right to appeal from the determination of value set by the State, must do so within the period of time provided by law or he is forever barred from doing so.

Title 66, Section 55 of the *Oklahoma* Statutes Annotated provides, in part:

> "The report of the Commissioners may be reviewed by the District Court on written exceptions filed by either party in the Clerk's office within thirty (30) days after the filing of such report . . . or either party may, within sixty (60) days after the filing of such report, file with the Clerk a written demand for a trial by jury . . ."

In the case of *Stedman* v. *State Highway Commission,* 174 Okla. 308, the Court held that the demand for a jury trial in the condemnation proceeding, if not filed within thirty (30) days after the filing of the Commissioners' Report, did not authorize an Order granting re-trial. To the same effect is *Western Farmers Electric Co-op* v. *Rowlett,* (Okla.) 288 Pacific 2d 726.

The law of Oklahoma indicates that a jury trial is the right of the person whose property is being taken, but he must take proper procedural steps to preserve it.

Chapter 472.4 of the *Iowa* Code Annotated, provides for a Commission to assess damages in eminent domain procedures. Chapter 472.18 provides, in part:

> ". . . any party interested may, within thirty (30) days after the assessment is made, appeal . . . by giving the adverse party . . . written notice that such appeal has been taken . . ."

In the case of *Kromar* v. *Independent School District,* 192 Iowa 734, the refusal of a district court to try a case because of a defective appeal, was sustained. The Court reasoned:

> "Aside from the constitutional provision, the right of appeal is created by statute; it is purely statutory in the instant case, and consequently the language

> of the statute and the clear intent as expressed therein must govern. The Notice of Appeal must be given in the method prescribed and in substantial compliance with the statute."

Iowa Law, therefore, in respect to eminent domain proceedings, corroborates the general principle that appeals must be perfected strictly in accordance with the methods of procedure.

The *Michigan* Constitution of 1908, Article XIII, provided in part as follows:

> "Section 2 — when private property is taken for the use . . . of the public . . . the just compensation . . . shall be ascertained by a jury of twelve (12) freeholders . . . or by not less than three (3) Commissioners . . . as shall be prescribed by law."

In the Constitution of 1963, this Article has been omitted and instead we find, in Article X, Section 2, the following:

> ". . . private property shall not be taken for public use without just compensation therefor being first made, or secured in a manner prescribed by law. Compensation shall be determined in a proceeding in a court of record."

It thus becomes evident that in the State of Michigan it was found desirable not to include the guarantee of a right to a jury trial in eminent domain proceedings by the Constitution.

Article I, Section 15, of the *Rhode Island* Constitution, provides that:

> "The right of trial by jury shall remain inviolate."

Chapter 37-6-18 of the Rhode Island Statutes reads:

> "Any owner . . . who cannot agree with the acquiring authority upon the price to be paid for his

> estate . . . may . . . apply by petition to the superior court . . . praying for an assessment by a jury."

The Supreme Court of Rhode Island considered whether a jury trial was mandatory or not in the case of *Atlantic Refining Co.* v. *Director of Public Works,* 200 A. 2d 580 (1964).

The court stated:

> ". . . a person whose property was taken for a public use had the right to have a jury assess his damages at least as far back as 1798 . . ."
>
> "having determined that 37-6-18 is directory and not mandatory, it necessarily follows that a petitioner proceeding thereunder should be afforded the right to waive a jury trial."

The procedures of chapter 163 are used by virtually all appropriating agencies throughout the State of Ohio. The need for answering within time is a great aid in expediting eminent domain matters where, otherwise, delay is almost standard operating procedure for those whose property is being taken for public improvement.

The concern of the legislature for expeditious handling of eminent domain matters is reflected in section 163.22, O.R.C., which reads in part:

> "Such proceedings shall be advanced as a matter of immediate public interest and concern and shall be heard by the court at the earliest practicable moment."

As far back as 1872 this court in the *Reckner* case, supra, stated with regard to landowners whose property is to be taken:

> ". . . a wise policy would dictate that he should be diligent in the assertion of his rights, so that the

wants of the public may be supplied without unnecessary delay."

SUMMARY

There seems little doubt that the main problem in this case is that appellants failed to file in timely fashion what in effect was a notice of appeal. They had ample time in which to file the notice and did not do so, and have offered no explanation as to why they did not do so.

Their rights to a jury trial in the matter of compensation for property taken was fully guaranteed to them. They could have obtained a jury trial simply by demanding it. They did not take any steps to preserve their rights and cannot now claim that their rights have been denied.

WHEREFORE, Appellee City of Cincinnati respectfully requests this court to deny a Writ of Certiorari.

THOMAS H. CRUSH
Assistant City Solicitor

APPENDIX A

CONSTITUTION OF OHIO
ARTICLE I, SECTION 19

Sec. 19. Inviolability of private property.

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

APPENDIX B

CONSTITUTION OF OHIO
ARTICLE XIII, SECTION 5

Section 5. Right of Way.

"No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."